U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: JAN 10 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

For Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as a musician and opera singer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided is whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. The petitioner does not claim to qualify as a member of the professions holding an advanced degree, and her occupation does not meet the regulatory definition of a profession set forth at 8 C.F.R. 204.5(k)(2).

Counsel asserts that the petitioner "is a classical vocal artist whose rare talent and mastery of Polish operatic roles have won her worldwide recognition." The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

It is noted that the regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above

that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.*

The petitioner states that she holds a "professional diploma," awarded in 1959 by the [redacted]. Counsel asserts that the petitioner "has a degree [redacted]" having "obtained her professional music education from [redacted]

The record contains no documentation from any entity identifying itself as a music conservatory. The only documentation of the petitioner's education consists of transcribed copies[1] (rather than photocopies) of a grade report and a diploma, along with translations. The translation of the transcribed diploma reads, in pertinent part:

STATE MUSIC HIGH SCHOOL

DIPLOMA

> [The petitioner] is considered ready for professional work as a musician in the field of solo singing, as well as for admission to universities in the field of music, according to [regulations] . . . regulating selection of first year university candidates and conditions for admission to art schools under the jurisdiction of the Ministry of Culture and Arts.

The phrase "high school" appears elsewhere on the diploma, and the grade report was signed not by any professor, dean, or school president, but by the "Main Subject Teacher" and "School Principal." This terminology, and the assertion that the petitioner now qualifies "for admission to universities" pursuant to regulations regarding "first year university candidates,"

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[1]The Polish-language documents indicate the placement of seals and signatures on the original documents, but do not themselves depict those indicia. The documents identify no school officials by name, instead repeating the phrase "signature illegible." The documents do not identify the preparer of the transcriptions.

indicate that the above diploma is equivalent to a U.S. high school diploma rather than a college-level degree. Absent persuasive evidence to overcome the plain wording of the petitioner's diploma, this office cannot conclude that the diploma demonstrates that the petitioner's level of education is demonstrative of a level of expertise significantly above what is ordinarily encountered in the field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The petitioner claims, on her Form ETA-750B Statement of Qualifications, that she worked "40+" hours per week for the State Philharmonia in Lodz from 1969 to 1988, and "40+" hours per week as a violin and piano instructor from 1975 to 1977.

The petitioner submits a copy of an "employment certificate" which states that she was a "choir artist" at the Arthur Rubinstein State Philharmonic in Lodz, Poland, from 1972 to 1988 "under contract at 1/2 time." The petitioner was on unpaid leave of absence from November 1988 to August 1990, when she left the Philharmonic. The regulation demands evidence of full-time employment; this document plainly states that the petitioner worked half-time, contradicting her claim of "40+" hours of employment per week.

The petitioner's employment contract pertaining to her work teaching violin lessons indicates that she worked "4 to 10 hours per week" from 1975 to 1976, and "5 to 6 hours per week" from 1976 to 1977, again flatly contradicting her claim of full-time employment.

While the petitioner has submitted evidence regarding individual performances in the United States since 1993, apart from the above documentation the record is devoid of primary evidence of the petitioner's employment prior to that date. Absent such evidence, this office cannot presume at least ten years of full-time employment since the petitioner's 1959 graduation, especially given the petitioner's misrepresentation (whether intentional or not) of her above part-time employment.

Evidence of membership in professional associations.

Counsel states that the petitioner "is a member of the Polish Singers Alliance, an organization for honored artists and musicians in the Polish community." The record does not reflect what the organization's membership requirements are, apart from being a Polish singer. Without such evidence, this office cannot determine that membership in the group separates the petitioner from other singers in terms of ability rather than simply national origin.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The record shows no formal recognition of specific achievements or contributions by peers, governmental entities, or professional or business organizations. Letters of recommendation from witnesses selected by the petitioner, solicited specifically to support this petition, carry less weight than evidence of awards or other recognition which exist independently of the petition.

The regulation at 8 C.F.R. 204.5(k)(3)(iii) states "if the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." Most of the evidentiary standards, including an additional criterion regarding salary which the petitioner does not claim to have satisfied, apply to the petitioner's occupation. The regulation does not permit substitution of "comparable evidence" in cases where the existing standards do apply to the alien's occupation, but the alien in question is unable to satisfy them.

The petitioner submits evidence that her work has been "featured and reviewed in prominent Polish-American periodicals." The petitioner has not established the prominence or circulation of these periodicals, or demonstrated that she has attracted any media attention outside of Polish-language newspapers published in Chicago.

The regulations do not indicate that an artist must have national or international standing to qualify as exceptional. Nevertheless, counsel has stated that the petitioner enjoys international recognition, and this claim, having been put forth, is subject to analysis and inquiry. The newspaper indicate only that the petitioner is "well known and popular," without specifying a context for these terms. An artist can be "well known and popular" in [redacted] while remaining entirely unknown elsewhere. Indeed, one article specifies that the petitioner is "one of the most popular artists among Polish Americans in Chicago."

The articles merely identify the petitioner as having performed at various events. It is routine for local newspapers to review local artistic performances; news coverage in the form of reviews does not establish exceptional ability. Furthermore, some of the performances mentioned in the reviews took place at restaurants, private club meeting halls, and similar venues. These events have not been concerts, where the petitioner is a main attraction, but rather have been meetings, parties, religious observances and other gatherings which offer musical entertainment as a side attraction. An announcement for a 1995 "Opera Gala" lists several "solo performers" but identifies the petitioner only as an "additional participant." Thus, the content of the articles does not

demonstrate that the petitioner has been exceptionally successful as a musical performer.

An article from Magasyn Polski lists the petitioner among "the most known Poles in Chicago." The list is divided into "Extra Class" and Leagues I, II and III. The petitioner's name appears in the League III list.

The petitioner submits several witness letters, to be addressed below in the context of the national interest waiver.

Pursuant to the foregoing discussion, the evidence available in the record does not support the director's finding that the petitioner qualifies as an alien of exceptional ability. Therefore, the director's finding is hereby withdrawn.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. This issue is moot, because the petitioner is ineligible under the classification sought, but the issue will be discussed because it was central to the director's decision.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish

that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel asserts that the petitioner promotes cultural understanding, while helping Polish expatriates in Chicago to "[m]aintain . . . ties to their culture and land of origin."

Several witness letters accompany the petition. Operatic tenor [redacted] of Chicago states that he and the petitioner performed together "on numerous occasions at prestigious concerts and festivals in Poland as well as abroad, namely in [redacted] and [redacted] Mr. [redacted] contends that the petitioner is a universally known and appreciated artist both in Poland and the United States." The documentary evidence of record suggests that the petitioner's reputation is restricted to Chicago's Polish community. The vague assertion by a Polish witness in Chicago that the petitioner is "universally known" carries little weight in the absence of corroboration. Other witnesses who similarly claim that the petitioner is well known throughout the United States are also based in Chicago, and their letters are generally translated from the Polish language.

In a joint letter, [redacted] and [redacted] respectively General Secretary and President of [redacted] Actors Alliance in Chicago, state that the petitioner "would be a [redacted] She brings with her the artistic skills of the highest order . . . to cultivate and maintain the Polish-American heritage."

[redacted] Director of [redacted] states that the petitioner is "an exceptionally talented artist needed in the repertoire of my theatre." Other Chicago-based Polish music figures state that they support the approval of this petition so that their community can continue to avail itself of the petitioner's talent. The petitioner has assisted various Catholic churches in the Chicago area with their musical presentations.

The director requested further evidence of the petitioner's service to the national interest. The petitioner responded by submitting further articles from Chicago's Polish-language media, and

information about some of the Polish figures in Chicago who had previously provided letters of reference.

The petitioner has also submitted general information about musical and cultural education. This documentation addresses the substantial intrinsic merit of the arts, but does not establish that the petitioner's work is national in scope or significantly serves the national interest.

The director denied the petition, stating that the "petitioner has not shown that her work has had or will have an impact on her field of endeavor that will be so substantial as to be in the national interest."

On appeal, counsel points to evidence which shows that the petitioner has participated at several symposia organized by the Polish Singers Alliance of America. Upon consideration, such involvement in national events can bestow at least limited national scope, satisfying the second prong of the national interest test. It is important to distinguish between national impact and national scope, which merely affords an opportunity for potential national impact. In this case, the petitioner's involvement in national symposia has presented a forum whereby the petitioner had the opportunity to have an impact at a national level, but evidence of her very involvement does not imply that the petitioner actually left any lasting impact or impression on her colleagues from across the nation. The vague assertion from General Choir Director [redacted] that the petitioner "became well known as an excellent soprano" cannot suffice to establish that the petitioner has had a significant national impact on the performing arts.

Counsel asserts that the petitioner has broadened her impact by "[t]utoring and mentoring aspiring singers" in various cities. The petitioner's impact in this regard is necessarily limited to those students whom she instructs. Spacing those students across several cities does not make the petitioner's influence more profound.

Counsel contends that the petitioner meets the third prong of the national interest test because "[h]er renditions of Polish operas and traditional Polish music help to preserve the unique Polish-American culture in Chicago, and inspire greater understanding and appreciation for Polish culture and traditional Polish Music nationwide." The petitioner has submitted a number of advertisements and notices regarding her performances in the U.S., and these materials are printed in Polish rather than English. This evidence suggests that the petitioner performs primarily for Polish audiences, who presumably are already familiar with Polish culture. The petitioner has not demonstrated that she plays a particularly significant role in "preserv[ing] the unique Polish-American culture," or that such culture would be in any significant danger of disappearing if the petitioner were not assisting in its preservation.

Counsel states "[t]he petitioner's past record of specific prior achievements indicates that she has benefitted and will continue to benefit the nation to a substantially greater extent than her colleagues." As support for this assertion, counsel cites letters and news articles from Chicago's Polish community. The above discussion of such evidence need not be repeated here. Counsel asserts that the petitioner "positively helps in overcoming bigotry and hate of non-native born Americans, and she positively assists in promoting American charitable organizations" by performing benefit concerts. The record, however, is devoid of evidence showing that the petitioner's activities have had a measurable effect on anti-immigrant sentiment or the causes for which she helps to raise funds.

Documents in the record indicate that the petitioner has been in the United States since late 1988, nearly a decade before she filed the petition in January 1998, but the objective evidence of record does not indicate that the petitioner's music has had any lasting or substantial effect outside of Chicago's Polish enclave during that span of time. The petitioner has certainly enjoyed a successful career in the arts, but the available evidence does not show that the benefits arising from her work are so substantial and widespread that her admission serves the national interest.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. Furthermore, the lack of reliable evidence to support the petitioner's claim of exceptional ability precludes consideration for the national interest waiver.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.